

## Division of Powers under Nepalese Federalism

– Gaurav Mishra

There are roughly 25 countries in the world, comprising around 40% of the total population, that practice federalism in one way or another. Virtually each of them differs with the other one on the system of division of powers among its federal structures. Some federal countries have unitary judiciary, including Nepal. Some federal countries vest the residual powers on the states, including, famously the USA. While most countries have two tiers of federal structure, some have three, including Nepal. Before delving further into the Nepalese context, it behooves us to appreciate the general purposes behind the division of powers under any federalism. Division of powers, at least in principle, is seen as a deterrence to the abuse of power by one tier (national) of government. Exercise of division of powers among multiple tiers of government is expected to ensure that the national government cannot bulldoze their way on issues in which it is preferable or appropriate to have tailor-made laws in accordance with the unique needs and culture of certain territories of a nation. There is also a comparatively underappreciated perspective on it: Late Justice of the United States Supreme Court Louis Brandeis famously stated in a case *New State Ice Co. v. Liebmann* that states serve as “laboratories of democracy,” which is to say division of powers allows a state (or local-level, where applicable) governments to experiment with issues incorporating novel solutions without risking the whole nation. In the Nepalese context, the Constitution enumerates the division of powers in Annexures 5, 6, and 8 among federal, state, and local levels, respectively. One has to scrutinize the enumerated division of powers and the exercise of the powers by the power holders in order to assess the balance and practicality of the division.

Annex 5 of the Constitution of Nepal enumerates powers in which the federal government has the exclusive rights. These usually include areas in which one nation adopts a single system throughout the nation. In other words, these are issues that are immensely crucial for a functioning nation to be delegated to the states and local-level governments. Annex 6 of the Constitution likewise enumerates exclusive powers of the state-level domain (7 throughout the nation). These are areas in which, supposedly, not only a nation can benefit from having differing models but also states can experiment with them in a manner that ideally is customized for their unique needs. Lastly, Annex 8 of the Constitution enlists issues that are under exclusive domain of the local governments (753 throughout the nation). This Annex includes issues that the general people actively encounter on a regular if not daily basis, hence they are much accessible to the general public.

In the Nepalese context, although all three tiers are vested with powers to levy taxes (as specified in the Annexures), it is crucial to look into the nature of other powers that are divided. By “nature of powers” I mean whether the powers are merely limited to basic administrative duties

that do not require much policy level deliberation or whether a power-holder can use a certain level of unique vision to exercise the powers to resolve their peculiar issues and can be highly customized based on needs and culture. The nature of powers are not mutually exclusive and most powers fall somewhere between those two ends of a spectrum, nevertheless it serves a purpose in showing the effectiveness of federalism, in principle, of a nation.

In the condition that powers that are divided and delegated are merely basic administrative powers, such as distribution of land ownership documents and local roadways management, then argument can be made that a nation does not necessarily practice federalism fully or meaningfully; such tasks do not require much policy-level discussion, hence they can be done by any tier of government with sufficient human resources to deal on that front.

In the case of Nepal, there are some customizable and creative powers delegated and divided among the states and local-level governments. For example, a state government can experiment by establishing state-level universities to meet their unique demands of education and human resources that they do not share with other states. States could also meet their unique needs by establishing their own unique *guthi* management practice, state police, or state investigation bureau. Similarly, local governments may also exercise their exclusive powers in the areas of basic and secondary education, local level development plans, management of local services, and disaster management in ways that suit their unique needs.

However, one cannot help but notice that many powers delegated to the state and local-level governments entail largely basic administrative powers or issues which need not be exercised in absence of the system of federalism. These include radio and TV operation, statistics, state highway, state assembly and council of ministers, land archiving for the states; and municipal assembly, distribution of land ownership documents, collection of statistics of unemployed and elderly, agriculture for the local-level governments. Indeed these are issues that are better dealt with by lower levels in any federal structures for efficiency and accessibility for the general public, but these do not necessarily need the machinery of federalism. In other words, there are few debates, and policy deliberation needed on these issues. These are basic administrative tasks that have to be performed in more or less the same way by any elected representative.

Similarly, it is equally important to study the practical exercise of the division of powers by the power holders (especially states and local-level governments) to evaluate how meaningful has federalism been in Nepal. In relation to issues that are largely administrative, one could evaluate the exercise by the difference in the level of efficiency and consistency of the exercise after the advent of federalism. Some examples of this might be: the number of state highways that states have constructed; convening of the state assemblies; time taken for one to obtain land ownership document; statistics update on elderly and unemployed people. Likewise, for issues that require a certain level of customization, policy-level deliberation, one could judge the exercise by probing

whether the actions have resolved the unique issues that are present in the territories. Not all states have established state-level universities, but one could review how the currently present state universities have dealt with their unique issues that national-level universities had not. How many local-level governments have employed modern and creative means to improve the access to basic and secondary education (especially in rural areas where students have to commute a considerable distance to reach the schools)? These are some of the parameters to judge how practically effective federalism has been in Nepal through the exercise of their exclusive power.

For years after the promulgation of the federal Constitution, experts and civil societies alike largely avoided empirical studies of the practical exercise of division of powers (especially by state and local level governments) predominantly because of the assumption of paucity of resources to fund and manage creative and visionary projects and novel experimentations with their powers to resolve their unique needs. But perhaps it is about time we examined the initial impact and effectiveness of federalism itself via studying how the federal structures through the nation have exercised their exclusive powers and how the experience has been compared to the then-unitary State of Nepal.